ORIGINAL

No. 93-6577

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD LEE DAVIS,
a/k/a EDDIE DAVIS,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTION PRESENTED

Should the principles of Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny be extended to other types of alleged discrimination when a Black venire person was subjected to a peremptory challenge based upon his religious affiliation as applied to the prosecutor's perception of his ability to sit in judgment of his fellow man?

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Respondent, State of Minnesota, respectfully prays that the Petition For A Writ of Certiorari be denied by this Court. The Minnesota Supreme Court opinion is reported as State v. Davis, 504 N.W.2d 767 (Minn. 1993) and is attached to the Petition as Appendix A.

STATEMENT OF THE CASE

The following is extracted directly from State v. Davis, 504 N.W.2d 767 (Minn. 1993) and provides a comprehensive Statement of the Case:

> "Defendant Edward Lee Davis, an African-American, was charged with aggravated robbery. No jurors were struck for cause during the jury selection. The defense, however, exercised four of its five peremptory strikes, while the State used one of its three. When the State used the one peremptory to strike a black man from the jury panel, defense counsel objected and asked for a race-neutral explanation. (Reference to footnote omitted.)
>
> The prosecutor, in response, stated for the record that the prospective juror would have been a very good juror for the State and that race had nothing to do with her decision to strike. She explained:
>
> > However it was highly significant to the State * * * that the man was a Jahovah [sic] Witness. I have a great deal of familiarity with the sect of Jahovah's Witness. I would never, if I had a preemptory [sic] challenge left, strike [--] or fail to strike a Jahovah Witness from my jury.
>
> She went on:
>
> > In my experience * * * that faith is very integral to their daily life in many ways, many Christians are not. That was reenforced at least three times a week he goes to church for separate meetings. The Jahovah Witness faith is of a mind the higher powers will take care of all things necessary. In my experience Jahovah Witness are reluctant to exercise authority over their fellow human beings in this Court House.
>
> The prosecutor concluded her statement by saying she did not feel it appropriate "to further pry" into this matter with the juror because there was no need to when exercising a peremptory on race-neutral grounds. Defense counsel had nothing further to

add, and the trial judge ruled the peremptory strike would stand."

Id., 504 N.W.2d at 768.

Petitioner was then subsequently convicted by the jury of Aggravated Robbery. The Minnesota Court of Appeals affirmed his conviction in an unpublished opinion, rejecting several different issues raised by Petitioner. See Petition For Writ Of Certiorari, Appendix B. The Minnesota Supreme Court accepted the case for further review, but only on the peremptory challenge issue. They, again, affirmed Petitioner's conviction.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The case at bar does not present any special or important reasons why certiorari should be granted. Batson and its progeny, at this point in time, are clearly limited to race. Moreover, this case arises from a single incident peremptory challenge without any long-standing historical pattern of discrimination. There is no conflict in decisions that might necessitate review nor did the Minnesota Supreme Court misapply any controlling principles of constitutional law set forth by this Court. In addition, the decision below turns upon its own facts and will affect few other litigants.

1. Batson Was Based Upon A Historical Pattern Of Racial Discrimination

In Batson, this Court held that a prosecutor may not challenge potential jurors solely on account of their race and eased the evidentiary burden established in Swain v. Alabama, 380 U.S. 202 (1965) for making a prima facie showing of racial discrimination. Batson v. Kentucky, 476 U.S. at 89 and 91-93. This Court also emphasized that the result was necessitated by a pattern of racial discrimination that had existed for over a century. Id., 476 U.S. at 84-89.

In subsequent decisions, this Court made it clear that Batson was uniquely addressed to claims of racial bias and that race was simply unrelated to a person's fitness as a juror. See

e.g. Gray v. Mississippi, 481 U.S. 648, 672 (1987) (Powell, J. concurring); Brown v. North Carolina, 479 U.S. 940, 940-942 (1986) (O'Connor, J. concurring in denial of certiorari). Racial discrimination was also involved when this Court extended Batson to White defendants, civil cases, and criminal defense counsel. Powers v. Ohio, ___U.S.___, 111 S.Ct. 1364 (1991); Edmonson v. Leesville Concrete Co., ___U.S.___, 111 S.Ct. 2077 (1991); Georgia v. McCollum, ___U.S.___, 112 S.Ct. 2348 (1992). The fact that this Court had always applied Batson to racial discrimination was expressly recognized by the Minnesota Supreme Court. State v. Davis, 504 N.W.2d at 768.

It was not until last term that this Court agreed to hear a case applying Batson to other forms of discrimination, i.e., gender discrimination. See J.E.B. v. State of Alabama ex rel. T.B., No. 92-1239 (cert. granted May 17, 1993). Petitioner seeks to "piggy-back" upon this grant of certiorari and seek an even further extension to allegations of religious discrimination. However, there are at least two critical differences from J.E.B. which do not compel review in the case at bar.

First, there is no documented history of using peremptories to perpetrate religious bigotry which mandates action by this Court. As previously noted, such a historical pattern was an underlying factor in Batson and was also apparently crucial to this Court's decision to grant certiorari in J.E.B. See Respondent's Appendix A reporting the oral

argument of J.E.B. on November 2, 1993. The absence of such a pattern was important to the Minnesota Supreme Court, for there is no religious bias which undermines the integrity of the peremptory challenge or, indeed, the entire jury system. State v. Davis, 504 N.W.2d at 771. Religious bias is not as flagrant as race, or even gender, nor has it risen to such an intolerable level as to require intervention by this Court.

Secondly, there is no split in legal authority on the topic. The extension of Batson to gender discrimination has caused both State and Federal Courts to decide virtually identical cases in opposite ways. Contrast People v. Irizarry, 142 Misc. 2d 793, 536 N.Y.S.2d 630 (N.Y. Sup. 1988) (extending Batson) and United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990), aff'd. en banc, 960 F.2d 1433 (9th Cir. 1992) (extending Batson) with J.E.B. v. State of Alabama ex. rel. T.B., 606 So.2d 156 (Ala. Civ. App. 1992), cert. granted ___U.S.___, 113 S.Ct. 2330 (1993) (refusing to extend Batson) and United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), cert. denied 493 U.S. 1069 (1991) (refusing to extend Batson). As will be discussed infra, there is simply no split of authority on the issue of religious discrimination which this Court needs to resolve.

2. There Is No Split In Legal Authority Which Merits Review

Contrary to Petitioner's claim, a decision from this Court will not resolve any split among lower courts on the issue of whether a Batson challenge can be answered by religion-based reasons. See Petition, P.P. 8-9. It is not necessary because there is no such split on FEDERAL constitutional grounds.

There are many cases which recognize that the religious beliefs or affiliations of a juror may provide a race-neutral reason for a Batson challenge. See e.g. Chambers v. State, 724 S.W.2d 440 (Tex. App.-Houston 1987) (No purposeful discrimination when peremptory challenge of Black based upon Church of Christ religious preference); Johnson v. State, 740 S.W.2d 868 (Tex. App.-Houston 1987) (Race-neutral reason provided when juror's conscience and religious beliefs prohibited him from sitting in judgment against anyone); Salazar v. State, 745 S.W.2d 385 (Tex. App.-Fort Worth 1987), aff. after remand on procedural issue, 818 S.W.2d 405 (Tex. Cr. App. 1991) (No Batson violation when use of peremptory challenge based upon religious affiliation); Nicks v. State, 598 N.E.2d 520 (Ind. 1992) (No Batson violation when juror had moral reservations regarding passing judgment on others); People v. Malone, 211 Ill App.3d 628, 570 N.E.2d 584 (Ill. App. Dist. 1 1991), appeal denied 584 N.E.2d 135 (Ill. 1991) (Batson challenge overcome by reasons of potential juror's religious

beliefs which included daily Bible reading); United States v. Clemmons, 892 F.2d 1153 (3rd Cir. 1989), cert. denied 496 U.S. 927 (1990) (No Batson violation when prosecutor struck Indian juror based upon his Hindu religious beliefs); United States v. De La Rosa, 911 F.2d 985 (5th Cir. 1990), cert. denied ___U.S.___, 111 S.Ct. 2275 (1991) (Batson challenge overcome by prospective juror's employment with a church ministry). The latter two cases are particularly relevant in that this Court has implicitly agreed with the proposition that there is no reason to extend Batson to allegations of religious discrimination.

On the other hand, the four cases cited by Petitioner are all either pre-Batson decisions involving race which had been decided upon a theory that applied the fair cross-section requirement to petit juries and/or decided upon state constitutional grounds. See Petition, P. 8. This Court has expressly rejected the former theory in a subsequent case and the Minnesota Supreme Court specifically refused to make Petitioner's requested extension under State constitutional principles. Holland v. Illinois, 493 U.S. 474 (1990); State v. Davis, 504 N.W.2d at 771. Thus, there is no federal constitutional split to resolve.

3. The Facts Of This Case Require Denial Of Certiorari

Even if this Court were inclined to grant certiorari and extend Batson to religion, this is plainly not the appropriate

case to do it. It is important to note that this is NOT a case where the peremptory challenge was premised solely upon a juror's affiliation as a Catholic, Lutheran, or even a Jehovah's Witness. Rather, it was a strike where the religious justification was clearly intertwined with some uncontested perceptions at the trial level about the person's ability to serve. Cf. State v. Davis, 504 N.W.2d at 772, n.4.

The record reflects that the venire person was an active member of the Jehovah Witness group. As stated by the prosecutor, the sect believes that higher powers will take care of all things and that group members are reluctant to exercise authority over their fellow human beings. See Petition, Appendix D. The validity of these perceptions has never been contested by Petitioner. Thus, her reasons, while having religious undertones, were founded upon a perception that this particular venire person may have a difficult time fulfilling his role as a juror. This, of course, is a far cry from blatant religious discrimination that is totally unrelated to an individual's fitness as a juror.

There is no question that the above was an important and crucial factor in the Minnesota Supreme Court decision. State v. Davis, 504 N.W.2d at 772. Without the connection between religion and the potential juror's ability to serve, the Batson prima facie case of discrimination would not have been overcome. Id. Therefore, there is no danger that the Minnesota Supreme

Court will allow unfettered religious discrimination in the exercise of peremptory challenges which requires intervention by this Court. The decision below clearly turned upon its own unique facts and will affect few other litigants.

In summary, petitioner has not presented any compelling reasons why certiorari should be granted. This case involved a single peremptory strike with some religious justification that focused directly on the person's perceived ability to serve; it did not involve any long-standing historical pattern of discrimination which may impair the integrity of the entire jury system. Cf. State v. Davis, 504 N.W.2d at 770.

CONCLUSION

For the reasons stated herein, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

New York Times Article of November 3, 1993 reporting oral argument in J.E.B. v. T.B., No. 92-1239 which occurred before this Court on November 2, 1993

Juror-Selection by Sex Is Weighed by Justices

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Nov. 2 — After all but eliminating race as a factor in jury selection over the last seven years, the Supreme Court today turned to the question of whether lawyers can remove potential jurors on the basis of their sex.

With the support of the Clinton Administration, a lawyer for a man who lost a paternity case before an Alabama jury of 12 women argued that the same constitutional principle of equal protection applied to considerations of sex as well as race in jury selection.

The State of Alabama, seeking in a civil trial to establish the man's paternity, used its jury challenges to remove men from the jury pool, a tactic that most state and Federal courts allow.

"Injury to the entire community" results from the exclusion of any group of jurors on the basis of "group bias and unwarranted stereotypes," the defendant's lawyer, John F. Porter 3d, told the Court in language that reflected the Justices' reasoning in the cases on race in jury challenges.

Mr. Porter argued that it was a logical next step to extend to sex the Court's precedents on race and jury selection that began with a 1986 landmark ruling, Batson v. Kentucky. But it was clear from the argument that this was a step that at least some Justices were reluctant to take.

"Is there nothing to the notion that a rape defendant or the defendant in a paternity case is worse off with an all-female jury?" Justice Antonin Scalia asked. "Is that really an 'unwarranted' stereotype?"

"Men and women have the same ability to be unbiased jurors," Mr. Porter replied.

"But they begin from different starting points on different issues," Justice Scalia persisted. "Is there nothing to the fact that men and women have different outlooks?"

When Mr. Porter said that the probability that most women might have one point of view did not justify excluding all women, Justice Scalia interrupted to exclaim, "But that's what peremptory challenges are all about — playing the odds!"

As opposed to challenges for cause, by which jurors who have opinions about a case or connections to it are removed from the panel, peremptory challenges do not require a lawyer to state any reason for removing a juror. American courts inherited peremptory challenges from the English jury system. Under the Supreme Court's Batson decision and subsequent rulings barring race as a basis for peremptory challenges, a judge may require lawyers to explain their use of peremptory challenges if they appear to be trying to shape a jury of one race or another.

> If a juror's sex matters, what about religion, or age?

One concern evident in the courtroom today was whether the addition of sex as a prohibited factor in jury selection would inevitably mean that religion, national origin, age and perhaps other factors would also be added to the prohibited list, with the result that there would essentially be nothing left to peremptory challenges.

Lois N. Brasfield, an Alabama Assistant Attorney General who was arguing against extending the Batson decision to sex, said that given the nation's history, race was a unique factor at which the Court should draw the line.

But Justices Sandra Day O'Connor and Ruth Bader Ginsburg both noted that Alabama had excluded women entirely from jury service until 1967, after the Supreme Court declared the practice unconstitutional. In light of that history, the analysis of the Batson decision cannot so easily be confined to race, Justice O'Connor said.

"I guess the Court has painted itself into a corner," she said, noting that under the Court's analysis in Batson, "the juror's own rights are at stake." Addressing Ms. Brasfield, Justice O'Connor asked: "How would you not apply that rule? How can you make a reasonable argument in light of this Court's jurisprudence?"

"No juror has a right to sit on a particular case," Ms. Brasfield replied.

"Yes, but particular jurors have a right not to have the state exclude them because of gender," Justice O'Connor said.

Justice Ginsburg said that because neither blacks nor women were historically permitted to serve on juries, barring the use of sex as well as race in jury selection would simply "be putting the peremptory challenge back where it was in the bad old days."

In lower court cases raising the issue, the Bush Administration had argued against extending the Batson precedent to sex. The Clinton Administration's Solicitor General, Drew S. Days 3d, changed the Government's position after the Supreme Court granted review in this case in May.

Michael R. Dreeben, an Assistant Solicitor General, told the Court today that "the community's confidence in the integrity of the process" was undermined by the exclusion of jurors on the basis of sex.

In this case, J.E.B. v. T.B., No. 92-1239, the defendant's lawyer had used his own peremptory challenges to remove women from the jury, just as the state had removed men. But because there happened to be twice as many women as men on the panel from which the jury was selected, the lawyers' duel ended with an all-female jury. The Alabama Supreme Court rejected the man's challenge to the constitutionality of the selection process.

Although he denied paternity, a blood test showed a 99.82 percent probability that the man, James E. Bowman Sr., was the father of a baby born to Teresia Bibb.

"I don't think he was found to be the father of the child because of a biased all-female jury, but because of the overwhelming evidence," Ms. Brasfield, the state's lawyer, told the Court.